Supreme Court U.S.
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No. 01-687

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
PETITIONER,

v.

LEONARD COTTON, MARQUETTE HALL, LAMONT THOMAS, MATILDA HALL, JOVAN POWELL, JESUS HALL, AND STANLEY HALL, JR.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED BY *AMICI CURIAE*

1. Are the threshold amounts of controlled substances which trigger increased maximum sentences under the various subsections of 21 U.S.C. § 841(b) elements of greater and lesser offenses, or are they non-elemental sentence-enhancing facts?

2. Did *Apprendi v. New Jersey*, 530 U.S. 466 (2000), authorize the courts to interpret federal criminal statutes as allowing maximum-sentence-increasing facts previously construed on the basis of purported congressional intent as mere "sentencing factors" to be *treated* instead as if they were elements of a greater offense without finding them to *be* actual elements?

3. May a federal appellate court affirm a concededly illegal sentence under the plain error rule of Fed. R. Crim. P. 52(b), by treating as "error" not the excessive sentence but the "failure" of the prosecutor to ask the grand jury to indict for a more serious offense, so long as the facts necessary to support the sentence are found by the appeals court, although never by the jury, to be supported by evidence admitted at trial and/or at the time of sentencing?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED BY AMICI CURIAE i

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Congress Created Drug Type and Amount in 21 U.S.C. § 841 as Offense Elements 6

II. Petitioner Endorses but Cannot Justify a Novel Approach Adopted by Most of the Courts of Appeals, Seeking to Evade the Choice Between Construing Threshold Drug Amounts as Elements of Different Offenses Under § 841(b) and Recognizing the Statute as Unconstitutional Under Apprendi. 17

III. The Holding in Neder v. United States, 527 U.S. 1 (1999), Cannot Be Extended to Allow a Court of Appeals to Decide that the Evidence at Trial or Sentencing Was Sufficient to Render "Harmless" the Defendant's Conviction and Life Sentence for a Level of Offense Not Charged in the Indictment or Presented at Trial. 23

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 2,3, 6, 7
Apprendi v. New Jersey, 530 U.S. 466 (2000) ... 2, 3, 5, 6, 12, 15, 17-21
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 19
Blockburger v. United States, 284 U.S. 299 (1932) 26
Blockburger v. United States, 284 U.S. 299 (1932) 10
Bousley v. United States, 523 U.S. 614 (1998) 17, 19, 21
Carter v. United States, 530 U.S. 255 (2000) 6, 8
Castillo v. United States, 530 U.S. 120 (2000) 6, 9, 13, 18, 21
Chiarella v. United States, 445 U.S. 222 (1980) 27
Cole v. Arkansas, 333 U.S. 196 (1948) 25-28
Cole v. Arkansas, 338 U.S. 345 (1949) 25-28
Dunn v. United States, 442 U.S. 100 (1979) 27
Eaton v. City of Tulsa, 415 U.S. 697 (1974) 27
Garner v. Louisiana, 368 U.S. 157 (1961) 27
Garrett v. United States, 471 U.S. 773 (1980) 13
Glover v. United States, 521 U.S. 198 (2001) 28
Gozlon-Peretz v. United States, 498 U.S. 395 (1990) 7
Heflin v. United States, 358 U.S. 415 (1959) 17
Hill v. Wallace, 259 U.S. 44 (1922) 19
Johnson v. United States, 520 U.S. 461 (1997) 23, 24
Jones v. United States, 526 U.S. 227 (1999) 6, 7, 9, 13, 19, 21
Joplin Merchandise Co. v. United States, 236 U.S. 531 (1915) 12
McCormick v. United States, 500 U.S. 257 (1991) 27
McMillan v. Pennsylvania, 477 U.S. 79 (1986) 2, 3, 10, 12,13, 15, 16, 22
Miller v. French, 530 U.S. 327 (2000) 19
Neder v. United States, 527 U.S. 1 (1999) ... 3, 23, 24, 27, 28
Normandale v. United States, 201 F.2d 463 (5th Cir. 1953) 10
Presnell v. Georgia, 439 U.S. 14 (1978) 27
Staples v. United States, 511 U.S. 600 (1994) 19
Tinder v. United States, 345 U.S. 565 (1953) 17
United States v. Acevedo, 891 F.2d 607 (7th Cir. 1989) ... 12
United States v. Alvarez, 735 F.2d 461 (11th Cir. 1984) .. 11

United States v. Barnes, 890 F.2d 545 (1st Cir. 1989) 12
United States v. Bazan, 807 F.2d 1200 (5th Cir. 1986) ... 11
United States v. Brough, 243 F.3d 1078 (7th Cir. 2001) 20, 21
United States v. Buckland, 277 F.3d 1173 (2002) 3, 5, 20-22
United States v. Buishas, 791 F.2d 1310 (7th Cir. 1986) .. 11
United States v. Castaneda, 9 F.3d 761 (9th Cir. 1993) ... 24
United States v. Chandler, 125 F.3d 892 (5th Cir. 1997) ... 8
United States v. Chapple, 985 F.2d 729 (3d Cir. 1993) ... 24
United States v. Coy, 19 F.3d 629 (11th Cir. 1994) 16
United States v. Crockett, 812 F.2d 626 (10th Cir. 1987) .. 11
United States v. Davis, 656 F.2d 153 (5th Cir. 1981) .. 10, 13
United States v. Detroit Lumber Co., 200 U.S. 321 (1906) 11
United States v. Doggett, 230 F.3d 160 (5th Cir. 2000) 19
United States v. Edwards, 105 F.3d 1179 (7th Cir. 1998), *aff'd*, 523 U.S. 511 (1998) 22, 24, 25
United States v. Elliot, 849 F.2d 886 (4th Cir. 1988) 10
United States v. Estell, 539 F.2d 697 (10th Cir. 1976) 11
United States v. Evans, 333 U.S. 483 (1948) 8, 21, 22
United States v. Gaudin, 515 U.S. 506 (1995) 23, 24
United States v. Grandison, 783 F.2d 1152 (4th Cir. 1986) 10, 22
United States v. Jackson, 390 U.S. 570 (1968) 19, 21
United States v. Jacobo, 934 F.2d 411 (2d Cir. 1991) 24
United States v. Jenkins, 866 F.2d 331 (10th Cir. 1989) .. 16
United States v. Lewis, 113 F.3d 487 (3d Cir. 1997) .. 12, 22
United States v. Lopez, 514 U.S. 549 (1995) 19
United States v. McCann, 940 F.2d 1352 (10th Cir. 1991) 12, 16
United States v. McHugh, 769 F.2d 860 (1st Cir. 1985) ... 11
United States v. McQuilken, 78 F.3d 105 (3d Cir. 1996) ... 9
United States v. Moreno, 899 F.2d 465 (6th Cir. 1990) 16, 24
United States v. Morgan, 835 F.2d 79 (5th Cir. 1987) 12
United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000) ... 20
United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001) 8
United States v. Olano, 507 U.S. 725 (1993) 28
United States v. Patrick, 959 F.2d 991 (D.C. Cir. 1992) ... 12
United States v. Pope, 561 F.2d 663 (6th Cir. 1977) 11
United States v. Powell, 886 F.2d 81 (4th Cir. 1989) .. 12, 13
United States v. Promise, 255 F.3d 150 (4th Cir. 2001) (en banc), *petition for cert. pending*, No. 01-6398 (docketed September 20, 2001) 8, 10, 15, 18, 20-22
United States v. Richardson, 529 U.S. 813 (1999) 8

United States v. Richardson, 86 F.3d 1537 (10th Cir. 1996), *cert. denied*, 519 U.S. 1030 (1996) 22
United States v. Rush, 240 F.3d 729 (8th Cir. 2001) 16
United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001), *petition for cert. pending*, No. 01-8100 (Docketed Jan. 15, 2002) 6, 10, 11, 19
United States v. Smith, 840 F.2d 886 (11th Cir. 1988) 12
United States v. Sotelo-Rivera, 931 F.2d 1317 (9th Cir. 1991) 12
United States v. Thomas, 274 F.3d 65 (2d Cir. 2001) (en banc) 17, 19, 20, 22
United States v. Vazquez, 271 F.3d 93 (3d Cir. 2001) (en banc), *petition for cert. pending*, No. 01-9014 (docketed March 15, 2002) 2, 5, 6, 8, 10, 14-16, 19, 28
United States v. Watts, 519 U.S. 148 (1997) 25
United States v. Webster, 750 F.2d 307 (5th Cir. 1984) 11, 12
United States v. Wood, 834 F.2d 1382 (8th Cir. 1987) 13
United States v. Wright, 742 F.2d 1215 (9th Cir. 1984) 11, 12

CONSTITUTION, STATUTES AND RULES

Controlled Substances Act of 1970, Pub. L. 91-513, Title II, Oct. 27, 1970, 84 Stat. 1260, as amended 2, 6, 7, 10, 11, 13
Infant Formula Act of 1980, Pub. L. 96-359, § 8(c)(2), Sept. 29, 1980, 94 Stat. 1260 14
110 Stat. 3807 ..... 11, 22
2 U.S.C. § 285a 11
2 U.S.C. § 285b 11
18 U.S.C. § 3742(b) 16
21 U.S.C. § 841 ..... 2, 3, 5-19, 22
21 U.S.C. § 842 ..... 8, 11
21 U.S.C. § 846 ..... 12, 27
21 U.S.C. § 848 13
21 U.S.C. § 848(a) (1970 ed.) 11
21 U.S.C. § 849 (1970 ed.) (repealed) 7, 8, 13
21 U.S.C. § 851 7
21 U.S.C. § 859 8
21 U.S.C. § 860 8
21 U.S.C. § 861 8
44 U.S.C. § 729 11
Fed. R. Crim. P. 52 4-6

Rule 37.3(a), Sup. Ct. Rules 1
Rule 37.6, Sup. Ct. Rules 1

OTHER AUTHORITIES

1 Wayne R. LaFave & Austin W. Scott, Substantive Criminal Law (1986) *8*
116 Cong. Rec. 33624-25 (1970) *10*
116 Cong. Rec. 33633 (1970) *14*
116 Cong. Rec. 33633-34 (1970) *14*
116 Cong. Rec. 33661 (1970) *14*
132 Cong.Rec. S14301 (daily ed., Sept. 30, 1986) *13, 15*
H.Rep. 91-1444, 91st Cong. 2d Sess. (1970), [1970] U.S. Code Cong. & Admin. News 4567 ..... *13, 14*
H. Rep. 96-936, 96th Cong. 2d Sess. 13 (1980) *14*
H. Doc. 98-32, 98th Cong. 1st Sess. *14*
H. Rep. 99-845, Part 1, 99th Cong., 2d Sess. (1986) *15*
Handbook on the Anti-Drug Abuse Act of 1986 (March 1987) *16*
M.D. Knoll & Richard G. Singer, "Searching for the 'Tail of the Dog': Finding 'Elements' of Crimes in the Wake of McMillan v. Pennsylvania," 22 Seattle Univ. L.Rev. 1057 (1999) *15*
S. Rep. 96-916, 96th Cong. 2d Sess. 14 (1980) *14*
S. Rep. 98-225, 98th Cong., 1st Sess. 258 (1983) *14*
United States Attorney's Manual *16*

BRIEF OF *AMICI CURIAE* NACDL AND FAMM IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.[1] NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan organization with 22,000 members and 30 Chapters nationwide. FAMM conducts research, promotes advocacy and educates the public regarding the excessive cost of mandatory minimum sentencing. The cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary to the prosecution. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime and the culpability of the offender. FAMM therefore has a special interest in ensuring that sentencing law and practice result in just outcomes, and to the extent that mandatory sentences are required by law, that they be arrived at in a manner consistent with statutory and constitutional mandates.

Amici have an interest in this case because the issues presented—both expressly and implicitly—are fundamental to proper constitutional government.

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[1]No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL and FAMM, made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

1. After *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and before *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the courts of appeals erroneously attributed to Congress an intent to establish drug amount in 21 U.S.C. § 841 as a sentence-enhancing fact. Petitioner affirmatively relies upon, but does not defend this uniform misinterpretation of 21 U.S.C. § 841. To the contrary, a proper application of the principles of statutory construction demonstrates that Congress intended drug amount (and drug type) to be elements of various greater and lesser drug offenses fully defined in 21 U.S.C. § 841(b).[2]

In *Almendarez-Torres v. United States*, 523 U.S. 224, 234, 235-36 (1998), this Court established a painstaking methodology for statutory inquiry into whether, without expressly saying so, Congress made an operative fact in a criminal statute only a sentence enhancer and not an element.[3] While *Almendarez-Torres* derived its methodology mainly from the circuits' § 841 precedents, the *Almendarez-Torres* statutory analysis, properly applied to § 841 itself, establishes that Congress intended drug types and amounts to be offense elements. The prevailing, yet incorrect, interpretation by the courts of appeals arose as a consequence of inappropriate judicial reliance upon

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[2]The statute conventionally known as 21 U.S.C. § 841 (1994 ed. & Supp. IV 1998) is properly referenced as the Controlled Substances Act of 1970, Pub. L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260, as amended (the "CSA"). The distinction is pertinent to the argument. *See, e.g., United States v. Vazquez*, 271 F.3d 93, 111-12 (3d Cir. 2001), *petition for cert. pending*, No. 01-9014 (docketed March 15, 2002). Except where essential, *Amici* employ the conventional reference.

[3]In addressing the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors,'" *Apprendi*, 530 U.S. at 494, the Court defined "sentencing factors" as limited to operative facts that support a sentence within the otherwise-set statutory range, as opposed to "the term 'sentence enhancement,'" which "describe[d] an increase beyond the maximum authorized statutory sentence." *Id.* at 494 n.19. So defined, the term "sentence enhancement" is not grammatically or conceptually parallel to the terms "elements" and "sentencing factors." Thus, *amici* follow petitioner's convention of using the term "sentence-enhancing fact" to refer to a maximum-extending operative fact, congressionally designated for judicial determination under a preponderance-of-the-evidence standard. *See, e.g.*, Pet. Br. at 42.

McMillan v. Pennsylvania in construction of § 841. The United States managed to secure an erroneous unanimity in the lower courts, without this Court ever reviewing the issue. The Court must reject that consensus and enforce Congressional intent in this case.

2. Petitioner attempts to avoid this statutory issue. Conceding that the sentence-enhancing interpretation of § 841 raises an issue under *Apprendi*, petitioner does not offer a saving construction of the statute. Rather, petitioner relies upon what would be a new mode of constitutional adjudication, an invention that authorizes courts to override the presupposed Congressional intent to create sentencing factors, thus allowing drug type and amount to be treated as offense elements. The Court must reject this approach as a judicial usurpation of legislative power.

The Ninth Circuit, sitting *en banc*, has recently rejected petitioner's approach, holding instead that Congress intentionally left to the courts the determination of the burden of proof and the fact-finder with respect to drug type and amount in § 841. *United States v. Buckland*, 277 F.3d 1173 (2002). The Ninth Circuit's analysis concedes that drug amount was *not* intended as a sentence-enhancing fact for judicial determination. After rejecting the main ground upon which drug type and amount had been construed as a sentence-enhancing fact, this analysis never explains why drug type and amount should be anything other than offense elements. This approach fails, because it is utterly unsupported by the *Almendarez-Torres* analysis. Moreover, if Congress had the specific intent to be vague the Ninth Circuit has attributed to it, the statute does not satisfy constitutional constraints placed upon legislation enacting federal criminal statutes.

3. Because Congress intended drug amounts to be offense elements of greater and lesser offenses under § 841(b)(1), petitioner's arguments in favor of a rule of harmlessness for "omission from a federal indictment of a fact that enhances the statutory maximum sentence," Pet. Br. at (I), must fail. The difference between what should have happened below under the proper construction of § 841 and what did happen below shows that petitioner's reliance upon *Neder v. United States*, 527 U.S. 1 (1999), is misplaced with respect to both the omitted instruction to the petit jury and the omitted allegation in the indictment. In *Neder*, an erroneous interpretation during trial of materiality as a "legal element"

merely resulted in the judge rather than the jury finding materiality. To affirm here, not only would a judge have to make a finding that the Constitution assigns to the jury, the finding would be on a fact not charged, found at the wrong stage of the proceedings and on a record created for a different purpose and under a different standard.

Here, the Court cannot reverse the judgment vacating respondents' life sentences without violating due process and validating a structural error. The erroneous statutory interpretation prevailing at trial resulted in their convictions for a lesser-included drug offense, but they were sentenced for an uncharged and untried greater-inclusive offense. Moreover, once drug amount is properly construed as an element, it becomes clear that respondents were denied not only a trial by jury, but also the benefit of the beyond-a-reasonable-doubt standard of proof, and notice and the opportunity to be heard under that standard of proof.

The judgment of the court below should therefore be affirmed.

ARGUMENT

Contrary to the underlying but undefended premise of petitioner's argument, it is not possible to analyze whether "error" is "plain," without first carefully identifying what legal "error" was supposedly committed, by whom, and when. Petitioner concedes an error in the sentence, Pet. Br. 16 (district court's imposition of sentence exceeding 20 years on each respondent conceded to be "error"), but bases its arguments on the premise that the error consists in an omission from the indictment. Pet. Br. 17 (identifying error in the case as "omission of an element or sentence-enhancing fact from an indictment," for purpose of applying Rule 52). Moreover, petitioner repeatedly suggests that the error either was or resulted from its own failure to ask the grand jury to allege the threshold amounts of cocaine and cocaine base in the indictment. Pet. Br. 12, 23, 25-26, 45-46. Petitioner never attempts to explain why its failure should be attributed to respondents (or even the district court). Petitioner never explains why the omission of drug amounts from the indictment is anything but its own strategic blunder, as seen in hindsight, or how that omission is an "error" in any sense pertinent to analysis under Fed. R. Crim. P. 52. The only "error" properly under consideration in this case is the

imposition of illegal sentences. The question is whether that error may be excused.

By first construing the statute to determine Congress' intent in including in 21 U.S.C. §841 specifications of various drug amounts – an exercise which this Court has never previously undertaken – the Court will greatly simplify the issues necessary to decide this case. Moreover, the Court can then decide the questions presented standing upon the bedrock of legal analysis rather than the loose and shifting sands of real or apparent concessions of "error"offered for the sole purpose of asking the Court to hold these ill-defined errors to be "harmless" and "not plain error" under Fed. R. Crim. P. 52.

Petitioner appears to suggest that any distinction between an element and a "sentence-enhancing fact" is, after *Apprendi*, immaterial for purposes of the application of Fed. R. Crim. P. 52. Pet. Br. at 16 & n.4, 17, 19, 30-31. Furthermore, petitioner argues for a rule of harmlessness applicable to both sentence-enhancing facts and elements. Pet. Br. at 36-37; *see also* Pet. at 20-22; Reply Br. on Pet. at 2-3 & n.1. Yet, Petitioner frames and argues the issues *necessarily* relying upon the assumption that drug amount in 21 U.S.C. § 841 is a sentence-enhancing fact and not an element of the offense.[4] *See, e.g.*, Pet. Br. at (I), 12, 22-24, 38-42.

Contrary to this assumption, *amici* submit that the Court, without any need to rely upon the doctrine of constitutional doubt and irrespective of the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), must conclude that Congress intended drug amounts (and drug types) in 21 U.S.C. § 841 as offense elements always, for all purposes. *Accord Vazquez*, 271 F.3d at 107-15 (Becker, Ch. J., concurring); *Buckland*, 277 F.3d at

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[4]Petitioner nowhere concedes that drug amount in § 841 *is* a congressionally defined offense element. Petitioner's assertion that the issue is the same whether drug amount is "viewed as an 'element' . . . or as a sentencing factor subject to . . . *Apprendi*," Pet. Br. at 16 n.4, plays on verbal variations among courts applying the same novel mode of constitutional analysis that supposedly permits courts to *contradict* a presupposed congressional intent. *See infra*, Part II. Petitioner's claim that statutory construction is unnecessary relies on that analysis and is merely a restatement of its strategic (but legally and factually dubious) concession that the Grand Jury Clause applies to sentence-enhancing facts (other than recidivism apparently). *Cf. Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (offense elements must be alleged, but *constitutionally valid* sentence-enhancing facts need not be alleged).

1187-95 (Hug, J.). That established, the Court cannot apply Fed. R. Crim. P. 52(b) in the manner Petitioner advocates.

I. Congress Created Drug Type and Amount in 21 U.S.C. § 841 as Offense Elements

Petitioner relies, for its *necessary* contention that drug amount is a sentence-enhancing fact rather than an element, upon the unanimous pre-*Apprendi* cases in the courts of appeals definitively construing drug amount (and, usually, drug type) as sentence-enhancing facts. Pet. Br. at 15 (citing *United States v. Sanchez*, 269 F.3d 1250, 1266-67 & n.30 (11th Cir. 2001), *petition for cert. pending*, No. 01-8100 (Docketed Jan. 15, 2002)). After the sentence-enhancing interpretation of drug type and threshold drug amounts became settled precedent in the courts of appeals, this Court decided *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the Court established a painstaking methodology for statutory inquiry into whether, without expressly saying so, Congress created a "sentencing factor" rather than an offense element. 523 U.S. at 228-39. A court must "look to the statute's language, structure, subject matter, context and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres*, 523 U.S. at 228; *see also Carter v. United States*, 530 U.S. 255, 272-74 (2000); *Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227, 232-39 (1999). *Almendarez-Torres* adopted much of its methodology from the lower court cases construing drug type and amount as sentence-enhancing facts. 523 U.S. at 234-36. It is, then, no small irony that the *Almendarez-Torres* analysis reveals, for the reasons set forth below, that the lower courts' sentence-enhancing fact interpretation of § 841 is wholly without foundation.

1. "Congress's failure to include drug type and quantity within its express sentence-enhancement provisions indicates its intent to treat these factors as elements of a crime." *Vazquez*, 271 F.3d at 111 (Becker, Ch.J., concurring in judgment); *cf. Jones*, 526 U.S. at 233; *Almendarez-Torres*, 523 U.S. at 249 (Scalia, J., dissenting). When Congress intended sentence-enhancing factors in the original Controlled Substances Act ("CSA") of 1970, it expressly said so. Congress made prior convictions a basis for increasing the statutory maximum punishment, CSA § 401(b). Congress

then unambiguously and expressly provided that recidivism was to be determined "after conviction but before pronouncement of sentence," 21 U.S.C. § 851(b) (1994 ed.), in a hearing "before the court without a jury," albeit with the fact to be determined "beyond a reasonable doubt." *Id.* § 851(c)(1). *See also* 21 U.S.C. § 849 (1970 ed.) (repealed).

In contrast, the CSA of 1970 did not include any similar provision to create sentence-enhancing factors with respect to drug type (and no drug amounts appeared). Since drug type and amount and prior convictions all appear in § 841(b), the exclusion from § 851 of drug type (and later, drug amount) demonstrates that Congress chose to treat only prior convictions as sentence-enhancing facts, with all other operative facts remaining elements. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990) (Congress presumed in CSA to act intentionally and purposely in disparate inclusion or exclusion).[5]

2. The language of the Section 841 (entitled "Prohibited acts A—Penalties" in the Statutes at Large) shows that subsection 841(b), not subsection 841(a), creates criminal offenses. It defines those offenses by the elements of drug type and amount.

Subsection (a) makes certain acts *unlawful* but is incomplete as a penal statute because it does not provide punishment. *Cf. Jones*, 526 U.S. at 233-34 (statutory description of "some very obnoxious behavior" alone fails to state a crime because it neither concluded with "shall be guilty of a felony" nor "shall be punished [or 'fined and imprisoned,' etc.]"). It is black letter law that a prohibition

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[5]In its petition, the United States argued that a doctrine of harmlessness is needed to remedy omissions of essential elements due to appellate changes in law, as well as prosecutorial errors. Pet. at 21. *Amici* submit that the underlying problem is the propensity of the courts of appeals to assume that operative facts are sentence-enhancing facts in the absence of any express congressional designation of those facts as such. As the text of its express sentence-enhancing provisions shows, Congress is well aware that defining a sentence-enhancing provision requires no more than a designation of the fact, the time it is to be at issue, the decision-maker and the burden of proof. 21 U.S.C. § 851(b) (1994 ed.); 21 U.S.C. § 849 (1970 ed.) (repealed). Amici respectfully submit that, in lieu of encouraging the *Almendarez-Torres*' implied sentence-enhancing fact analysis by extending the harmless error doctrines to validate errors, the Court should overrule *Almendarez-Torres* in favor of a plain-statement rule applicable to sentence-enhancement provisions.

without a specified penalty creates no crime. 1 Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* § 1.2(d), at 12-13 (1986); *see United States v. Evans*, 333 U.S. 483, 486, 490-99 (1948). Rather, as the Court recently termed it, subsection 841(a) creates a "statutory prohibition," subject to both civil and criminal enforcement. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 499 (2001); *see also id.* at 486, 494 n.7.

That § 841(a) merely creates a "statutory prohibition" is confirmed in § 842, a parallel provision of the CSA ("Prohibited acts B—Penalties" in the Statutes at Large). It, too, makes certain acts "unlawful." 21 U.S.C. § 842(a). A violation of § 842(a), however, "does not constitute a crime" except as provided in § 842(c)(2). 21 U.S.C. § 842(a), (c)(3) (1994 ed.). *See United States v. Richardson*, 529 U.S. 813, 819 (1999). As with § 842(a), the act provides criminal offenses for violations of § 841(a); in the case of § 841, these are in § 841(b)(1-3).[6]

Subsection (b), in contrast to § 841(a) is complete as a criminal statute. In its unnumbered preamble, subsection (b) uses the active voice ("any person who violates subsection (a) ...."), which the Court deems typical offense-defining language. *Carter*, 530 U.S. at 272-73. Subsection (b) expressly incorporates an act in violation of subsection (a) as an element. The "violates subsection (a)" language also appears in other sections of the CSA, as amended. 21 U.S.C. §§ 849, 859-61. These sections have been consistently construed to define offenses, not sentencing provisions. *See, e.g., United States v. Chandler*, 125 F.3d 892, 896 (5th Cir. 1997) (§ 860, which expressly incorporates a violation of § 841(a), just as does § 841(b), is greater-inclusive offense of §

[6]Judge Luttig, concurring in the result in *United States v. Promise*, 255 F.3d 150, 170-72 (4th Cir. 2001) (en banc), *petition for cert. pending*, No. 01-6398 (docketed September 20, 2001), reads § 841(a) as a complete criminal offense with a statutory maximum of life imprisonment. Not only is such a reading refuted because the "shall be unlawful" language used in § 842(a) expressly does not even create a crime, the reading is ahistorical. Subsection (a) has not been altered since 1970, when the maximum sentence of imprisonment under *any* set of facts for its violation was 30 years. *See* 21 U.S.C. § 841(b)(1)(A) (1970 ed.) (as amended and modified, currently §841(b)(1)(C); *cf. Vazquez*, 271 F.3d at 114 (Becker, Ch J., concurring) (Congress could not have structured § 841 to comply with *Apprendi*).

841); *United States v. McQuilken*, 78 F.3d 105, 108 (3d Cir. 1996) (same).

Subsection (b), unlike subsection (a), contains punishment-introducing language, followed by punishment. 21 U.S.C. § 841(b). In fact, with respect to each subparagraph of paragraph (b)(1), a punishment-introducing clause appears twice, in the unnumbered preamble following "violates subsection (a)" and also following the specification of covered drug types and amounts. *See, e.g., id.* § 841(b)(1)(A). The two punishment-introducing clauses appear in a single sentence that reads like a traditionally defined crime. For example:

> [A]ny person who violates subsection (a) of this section shall be sentenced as follows: ... (1)(A) In the case of a violation of subsection (a) of this section involving— (ii) 5 kilograms or more of a mixture or substance containing a detectible amount of [cocaine]; . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . a fine not to exceed the greater of that authorized by title 18 or $4,000,000 if the defendant is an individual ..., or both.

21 U.S.C. § 841(b)(1)(C). As with the weapon type in *Castillo*, drug type and amount appear in a single sentence with other elements, separate from the following complete sentences that address traditional sentencing concerns.[7] "These structural features strongly suggest that the basic job of the entire first sentence is the definition of crimes and the role of the remaining ... sentences is the description of factors (such as recidivism) that ordinarily pertain only to sentencing." *Castillo*, 530 U.S. at 125.[8]

[7]Like drug type and amount, the operative fact of causation of death or bodily injury appears in the primary offense-defining sentence when recidivism is not involved. As held in *Jones*, 526 U.S. at 236-37, death and injury-causation are traditional elements, not traditional sentencing factors. In § 841(b)(1)(A), following the primary-offense defining sentence, "shall be sentenced" appears three times in two sentences defining the consequences of "such a violation" (referring to the primary sentence) in the presence of recidivism and recidivism combined with death or bodily injury.

[8]Paragraph 841(b)(5), in typical offense defining language, increases maximum fines for "[a]ny person who violates subsection (a) of this section by cultivating a controlled substance on Federal property." 21 U.S.C. § 841(b)(5). Congress' using offense creating language to raise fines

Reading subsection (b) as the offense defining provision, it can be seen that Congress created an "efficient double-axis prosecution scheme, under which each act in violation of what is now § 841(a) (manufacture, distribute, etc) could be prosecuted with respect to different drug types." *Vazquez*, 271 F.3d at 109 (Becker, Ch. J.). Such a reading is consistent with pre-CSA federal drug laws, under which offense elements were narrowly defined so that offenses could be cumulated. *Blockburger v. United States*, 284 U.S. 299, 302 (1932) (each sale is a crime); *Normandale v. United States*, 201 F.2d 463, 464 (5th Cir. 1953) (each drug is a separate element). In fact, before *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the court below employed this double axis prosecution scheme under the CSA. *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) (possession of each scheduled substance is a separate offense); *United States v. Elliot*, 849 F.2d 886, 888-90 (4th Cir. 1988) (each distribution is separate offense); *cf. Promise*, 255 F.3d at 175 (Luttig, J., concurring in judgment) (disputing "double-axis" thesis by doubting Congress created 350 different offenses).[9] The idea that § 841(a) contains all offense elements (and that drug type is an intended sentencing factor) is simply inconsistent with Congress' intent to unify federal drug laws in a single statute without relaxing their preexisting punitive force. *Vazquez*, 271 F.3d at 109; *United States v. Davis*, 656 F.2d 153, 156-60 (5th Cir. 1981).

To deem § 841(a)(1) the exclusive offense-creating provision, lower courts have relied on the subsection headings "Unlawful acts" and "Penalties" that appear in the United States Code. *See Sanchez*, 269 F.3d at 1263-66; *Promise*, 255 F.3d at 170-72 (Luttig, J., concurring in judgment). This reliance is wholly baseless.

The Act Congress passed does not contain those headings. Controlled Substances Act of 1970, Pub. L. 91-513, Title II, §§ 401-10, Oct. 27, 1970, *reprinted in* Stat.L. 1466-68, 91st Cong., 2d Sess.; *see also* 116 Cong. Rec. 33624-25 (1970). The Office

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petitioner contends are fixed entirely by "sentencing factors" undercuts petitioner's interpretation of § 841(b)(1)-(3) as containing sentencing factors, not elements.

9 Presumably, Judge Luttig believes Congress created "some 350" *sentencing factors* without an express word saying so.

of the Federal Register, National Archives and Records Services added a reference to "penalties" as a margin note to the Statutes at Large. 84 Stat. 1260; *see* 44 U.S.C. § 729 (1994 ed.). Only the bill number and date is required by law, *see id.*, and such margin notes are mere finding tools for users' convenience. *Cf. United States v. Detroit Lumber Co.*, 200 U.S. 321, 337 (1906) (court syllabus). When the CSA was reproduced in the United States Code, the editors converted the margin notes into subsection headings. *See generally* 2 U.S.C. §§ 285a, 285b(1) & (3) (1994 ed.). Because Title 21, unlike some others, has not itself been enacted into law, the Statutes at Large, not the United States Code, are the authoritative source of law. *Id.* § 285b(3); 2 U.S.C., Supp. IV, at vii (1998). Congress did not enact these headings in the 1984 or 1986 amendments. Thus, no subheadings exist in the controlling statute.[10]

3. Until 1986, the courts of appeals correctly understood that Congress defined a variety of related drug offenses in § 841(b). For at least 16 years after Congress passed the CSA of 1970, the courts of appeals generally treated drug type, and when it was added as an operative fact, drug amount, as elements of a § 841 offense. See, *e.g.*, *United States v. Bazan*, 807 F.2d 1200, 1206 (5th Cir. 1986).[11] For example, in 1984, the court in *United States v. Webster*, 750 F.2d 307 (5th Cir.

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[10]In the face of the legislative record and petitioner's concession in that case that the headings could not be relied upon, the Eleventh Circuit nevertheless grounded its conclusion that "§ 841 is bifurcated, providing a clear dichotomy of offense elements and sentencing factors," *Sanchez*, 269 F.3d at 1265, on *nothing but* these non-existent headings. *Id.* at 1263-65. Such headings are inaccurate as indicators of where elements are defined. *See, e.g.*, 21 U.S.C. § 842(c)(2)(A) (1994 ed.) (offense defined under "penalties" heading); 21 U.S.C. § 848(a) (1970 ed.) (distinct crime entitled "Penalties; forfeitures"). Moreover, when it created a separate, complete offense in § 841(b)(7), Congress itself enacted a title line, "Penalties for Distribution." 110 Stat. 3807. Congress often uses "penalty" to distinguish crimes from civil prohibitions.

[11]*See also, e.g.*, *United States v. Crockett*, 812 F.2d 626, 628-29 (10th Cir. 1987); *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986); *United States v. McHugh*, 769 F.2d 860, 868 (1st Cir. 1985); *United States v. Wright*, 742 F.2d 1215, 1220-21 (9th Cir. 1984); *United States v. Alvarez*, 735 F.2d 461, 466-68 (11th Cir. 1984); *United States v. Pope*, 561 F.2d 663, 669-70 (6th Cir. 1977); *United States v. Estell*, 539 F.2d 697, 699 (10th Cir. 1976) ("the presence and identity of the drug is the thing and ... the quantity is not important" under 1970 Act).

1984), affirmed a jury verdict and sentence for an indicted conspiracy to possess 1000 pounds or more of marijuana. The *Webster* jury, instructed on lesser included offenses relating to marijuana without regard to quantity, had convicted the defendant of the indicted amount, and the court considered that conviction binding on the court and parties. Honoring the verdict, the court rejected challenges to the sufficiency of the evidence of amount and the failure to preserve the contraband on grounds inconsistent with a reading that drug amount is merely a sentencing factor. *Id.* at 332. Moreover, the court noted that the quantity recovered need not exceed the threshold, as to any conspiracy count, if defendants had *agreed* to exceed the threshold. *Webster*, 750 F.2d at 334 n.13. *See generally Joplin Merchandise Co. v. United States*, 236 U.S. 531, 535 (1915) (object of conspiracy must be alleged in charging language of the conspiracy count). Affirming a jury verdict on such a basis is logical *only* if the Court considered marijuana amount an offense element.[12]

In 1986, this Court decided *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). "[I]t is fair to say that *McMillan* began a revolution in the law regarding the definition of "'crime.'" *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring). After *McMillan*, the *courts of appeals* decided that drug type and amount had become maximum-extending sentencing enhancers. E.g., *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987).[13] The courts relied upon *McMillan*'s constitutional

[12]As *Webster* recognized, a drug amount actually possessed does not *ipso facto* establish a floor or a ceiling with respect to the co-conspirators' *actual agreement*. *Accord Wright*, 742 F.2d at 1220-21; 21 U.S.C. § 846. Petitioner, however, does not concede that drug amount defines the conspiratorial object. Rather, isolating the word "involving" from the offense-defining text of § 841(b), petitioner cites evidence of quantities *actually possessed*, without making the necessary connection to respondents' *actual agreement*. Pet. Br. at 43-46. Thus, with drug amount as a § 841(b)(1)(A) offense element, petitioner fails to address its accuracy arguments to the "omitted" element, properly defined.

[13]*See also, e.g., United States v. Lewis*, 113 F.3d 487, 489-92 (3d Cir. 1997); *United States v. Patrick*, 959 F.2d 991, 995 n.5 (D.C. Cir. 1992); *United States v. McCann*, 940 F.2d 1352, 1354, 1358 (10th Cir. 1991); *United States v. Sotelo-Rivera*, 931 F.2d 1317, 1319 (9th Cir. 1991); *United States v. Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989); *United States v. Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989); *United States v. Acevedo*, 891 F.2d 607, 611 (7th Cir. 1989); *United States v. Smith*, 840 F.2d 886, 888 (11th Cir. 1988); *United States v. Wood*, 834 F.2d 1382, 1388-90 (8th Cir. 1987).

holding in conducting their statutory reconstruction of § 841. *E.g., United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990); *Powell*, 886 F.2d at 84, 85. True, *McMillan* held that an express, legislatively enacted sentencing factor predicate to mandatory minimum sentences was *permitted*. But nothing in the history of the federal drug statute shows that Congress (without saying so) *intended* to take advantage of *McMillan* and make drug type and/or amount into maximum-extending sentencing enhancers.

5. The legislative history of the CSA of 1970 shows no non-recidivist sentencing enhancers were intended in § 841. Congress expressed no intent in 1970 to make drug type a sentencing enhancer rather than an element. (Amount was statutorily irrelevant in the original CSA.) The legislative history discusses "penalties" corresponding to "violations," which is unremarkable in the context of a discussion of a penal statute. H.Rep. No. 91-1444, 91st Cong. 2d Sess. (1970), [1970] U.S. Code Cong. & Admin. News, at 4567, 4570, 4571, 4574, 4575-79, 4614, 4618. No inference that the report meant "sentence-enhancing fact" or "sentencing factor" when it said "penalty" can be drawn. The report subsection entitled "Criminal Penalties," *id.* at 4575, leads with a discussion of the new continuing criminal enterprise offense, which Congress clearly intended to be a separate offense. *See Garrett v. United States*, 471 U.S. 773, 783-84 (1980); *cf. Jones*, 526 U.S. at 237-38 (finding "unimpressive" the Government's equating of "penalty enhancement" with "sentencing factor"); *Castillo*, 530 U.S. at 128-30 (similar).[14]

The absence of any intent to make operative facts (aside from prior convictions) sentencing enhancers under § 841 is shown by the debates over sections 408 and 409 of the CSA, 21 U.S.C. § 848 (continuing criminal enterprise) and 21 U.S.C. § 849 (1970) [repealed] (dangerous special drug offender sentencing). Due to constitutional objections foreshadowing

[14]The Fifth Circuit has relied on Congress' intent to provide "maximum flexibility to the judges." *Davis*, 656 F.2d at 159. In context, the cited phrase from the legislative history refers to the elimination of almost all mandatory penalties from the CSA of 1970. When mandatory minimum sentences were reintroduced in 1986, it was precisely to remove judicial discretion by making the jury's drug type and amount findings conclusive as to minimum penalties. 132 Cong.Rec. S14301 (daily ed., Sept. 30, 1986).

Apprendi, the proposed new continuing criminal enterprise provision was explicitly changed from a sentence-enhancing provision into an offense. H. Rep. No. 91-1444, [1970] U.S. Code Cong. & Admin. News, at 4651 (additional views). When the CSA came to the House floor, the special dangerous drug offender sentencing provision was introduced, vigorously debated (again along lines foreshadowing *Apprendi*) and ultimately added to the CSA. CSA § 409; 116 Cong. Rec. 33633 (1970); 116 Cong. Rec. 33633-34 (1970); 116 Cong. Rec. 33661 (1970). Yet, even the author of the sentencing provision agreed that the traditional right to trial by jury attached to the predicate violation of the CSA. *Id.* at 33634. The lack of similar debate on § 841 confirms that Congress did not intend to change pre-CSA practice and re-designate drug type as a sentence-enhancing fact.

6. The legislative history of post-1970 amendments shows that threshold drug amount is an element. In the Infant Formula Act of 1980, Pub. L. 96-359, § 8(c)(2), Sept. 29, 1980, 94 Stat. 1260, Congress first added a threshold drug amount (at least 1000 pounds of marijuana) as an operative fact in the former § 841(b)(6), using offense-creating language similar to that later contained in subparagraphs (1)(A) and (B). Both the House and Senate Reports state, "[i]ndividuals *convicted* of trafficking in over 1,000 pounds would be subject to a maximum 15 year prison sentence and/or a maximum $125,000 fine." H. Rep. 96-936, 96th Cong. 2d Sess. 13 (1980); S. Rep. 96-916, 96th Cong. 2d Sess. 14 (1980) (emphasis added). It can be presumed that Congress used the word "convicted" advisedly and because it intended amount to be an element of the offense. *See Vazquez*, 271 F.3d at 109 (Becker, Ch.J., concurring in judgment).

In 1984, Congress adopted the former § 841(b)(1)(A). Both the Justice Department, which drafted the provision, *see* H. Doc. 98-32, 98th Cong. 1st Sess., and the Senate Report note that, except for marijuana, the prior law did not account for the important factor of the amount of the drug involved. Thus, Congress created "a new subparagraph (A) under § 841(b)(1) that would provide, for offenses involving large amounts of particularly dangerous drugs, higher penalties than those now provided under section 841." S. Rep. 98-225, 98th Cong., 1st Sess. 258 (1983). "The use of the plural 'offenses' indicates Congress's intention to create within a single statute a multitude of separate crimes depending on

drug type and quantity." *Vazquez*, 271 F.3d at 110 (Becker, Ch.J.); *cf. Promise*, 255 F.3d at 175 (Luttig, J., concurring in judgment).

In 1986, Congress, using the internal structure of subparagraph (b)(1)(A) of the 1984 amendments, created new subparagraphs (b)(1)(A) and (B) and included mandatory minimum sentences for offenses under those subparagraphs. Again, the legislative history contains no discussion referencing sentence-enhancing facts. The Government was involved in the hearings, and assured Congress that prosecutors could present evidence of drug amount passing the sufficiency of the evidence test (which applies to convictions, not sentencing), by introducing into evidence testimony about large drug transactions, rather than drugs themselves in the threshold quantities. H. Rep. 99-845, Part 1, 99th Cong., 2d Sess., at 12 (1986); *see also id.* at 19 (referring to "person convicted under" subparagraphs (b)(1)(A) & (B)); 132 Cong. Rec. S14301 (daily ed. Sept. 30, 1986) (Sen. Byrd: finding of guilt removes judicial discretion regarding mandatory minimums). *Accord Vazquez*, 271 F.3d at 110 (Becker, Ch.J.). Thus, when Congress gave § 841 the structure that it substantially retains today, Congress intended drug type and amount to be elements of § 841 offenses.[15]

7. The Justice Department initially knew Congress created drug type and amount as offense elements, and nonetheless seized upon and spread the early misinterpretations of the courts of appeals. Immediately following the 1986 amendments, the Department of Justice published its

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[15]Although the Court decided *McMillan* four months before Congress passed the 1986 amendments to § 841, nothing in the text or legislative history indicates that Congress defined drug type and amount in § 841 in reliance upon *McMillan*. *Cf. Apprendi*, 530 U.S. at 487 n.13; *see also id.* at 564 (Breyer, J., dissenting) (citing § 841(b) as an example of possible legislative reliance on *McMillan*). Rather, the language, structure and legislative history of § 841 is consistent with the long-standing tradition of treating type and amount operative facts in federal criminal statutes as offense elements for jury determination. *See* M.D. Knoll & Richard G. Singer, "Searching for the 'Tail of the Dog': Finding 'Elements' of Crimes in the Wake of *McMillan v. Pennsylvania*," 22 Seattle Univ. L.Rev. 1057 (1999). Moreover, in 1988 -- after many circuits had begun reversing course and describing § 841(b) as containing only *McMillan*-esque "sentencing factors" -- Congress amended § 841(b)(1)(A) (in the third complete sentence) to contain an internal reference to "a violation of this subparagraph," thus confirming in the text of § 841(b) itself that the offense, and not merely "sentencing factors," are found therein.

understanding of the amendments. *Handbook on the Anti-Drug Abuse Act of 1986*, at 1-9, 13-17, 20-21 (March 1987). The *1986 Handbook* repeatedly refers to *convictions* under the subparagraphs of § 841(b)(1). *Id.* at 3-4, 6-7. The Department referred to "a 'lesser included offense' in which the quantity of the controlled substance in question is not specified ...." *1986 Handbook*, at 8-9. The Handbook also "recommends" that to invoke penalties "based upon the *kind* and *quantity* of drug involved in particular offenses," prosecutors should allege and prove at trial drug type and amount. *Id.* at 20. The *1986 Handbook* distinguished *McMillan* as relating to a mandatory minimum provision expressly to be determined at sentencing. *Handbook* at 21. The government's understanding as demonstrated in the *1986 Handbook* is further persuasive evidence of Congress' determination to identify drug type and amount in § 841(b)(1) as offense elements. *Vazquez*, 271 F.3d at 110-11 (Becker, Ch J., concurring).

Despite its fundamentally sound analysis of drug type and amount as § 841 offense elements in the *1986 Handbook*, the Department of Justice seized upon the early post-*McMillan* sentence-enhancing fact cases and adopted and enforced a national policy to avoid juries and lower its burden of proof in drug cases.[16] Thus, the United States secured an erroneous unanimity throughout the courts of appeal without ever having the Court address whether Congress intended drug amount (and drug type) as offense elements.

Because allegations of drug quantity do not merely give notice of a potential sentence increase but actually constitute elements of a greater-inclusive offense, omission of those elements is fatal to any claim of judicial power to sentence beyond the maximum for the lesser offense actually alleged. This is persuasively demonstrated in the respondents' brief

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[16] *See United States v. Coy*, 19 F.3d 629 (11th Cir. 1994) (cross-appeal) *United States v. McCann*, 940 F.2d 1352 (10th Cir. 1991) (cross-appeal); *United States v. Moreno*, 899 F.2d 465 (6th Cir. 1990) (cross-appeal); *United States v. Jenkins*, 866 F.2d 331 (10th Cir. 1989) (mandamus); 18 U.S.C. § 3742(b) (prosecution of criminal appeals requires personal approval of the Attorney General, the Solicitor General, or the Solicitor General's designee); *United States Attorney's Manual* § 9-2.170(A)(1 & 3) (appeals and mandamus requires DOJ level approval). Petitioner continues to enforce the erroneous implied sentence-enhancing fact interpretation of § 841. *See, e.g., United States v. Rush*, 240 F.3d 729, 731 (8th Cir. 2001).

and those unquestioned authorities need not be discussed here. *See, e.g., Heflin v. United States*, 358 U.S. 415, 422 (1959); *Tinder v. United States*, 345 U.S. 565 (1953). On purely statutory grounds, regardless of *Apprendi*, the respondents' sentences are illegal and must be corrected.

II. Petitioner Endorses but Cannot Justify a Novel Approach Adopted by Most of the Courts of Appeals, Seeking to Evade the Choice Between Construing Threshold Drug Amounts as Elements of Different Offenses Under § 841(b) and Recognizing the Statute as Unconstitutional Under *Apprendi*.

A careful analysis of 21 U.S.C. § 841(b) shows that drug quantity, when made relevant by the statute as a basis for increased maximum sentences, is an element of the offense, because Congress intended it to be such. This interpretation saves the statute from being declared unconstitutional under *Apprendi v. New Jersey*, but the government resists it, perhaps fearing an avalanche of post-conviction petitions. *Cf. Bousley v. United States*, 523 U.S. 614 (1998). A large number of indictments, jury instructions, guilty plea colloquies, and sentences since the mid-1980s have been premised on the interpretation that drug quantity was only a "sentencing factor." That reliance was fostered by a successful government litigation campaign in all the circuits from 1986 - 1999. The circuits, with surprising near-unanimity, have now endorsed a new interpretation of the statute, compelled most say by the decision in *Apprendi*. Those cases, followed recently by the Second Circuit in *United States v. Thomas*, 274 F.3d 65 (2d Cir. 2001) (en banc), hold that *Apprendi*, as a matter of constitutional law, converted facts formerly construed as "sentencing factors," which the jury was forbidden to consider, into facts that, while not recognized as elements, were nonetheless to be treated "like elements." Those courts, endorsed by the petitioner here (Pet. Br. 15), thus view the problem as essentially procedural, rather than as involving the substantive constitutionality of the statute. This line of analysis is inconsistent with the actual decision and reasoning in *Apprendi*, and does not withstand scrutiny.

1. This Court in *Apprendi* applied the traditional doctrine of judicial review to *invalidate* a New Jersey statute that had been definitively construed to contain a sentence-enhancing

fact. *See Apprendi*, 530 U.S. at 468-69, 476, 491-92, 497. The Court reviewed the *statute* exposing the defendant to the enhanced sentence, rather than reviewing merely the particular *sentence imposed* and the procedures applied to impose it. *See id.* at 468 (the opinion begins, "A New Jersey statute ...."); *id.* at 469 (positing question presented in statutory terms); *id.* at 482 (addressing the "legislative scheme"); *id.* at 482-83, 483 n.10, 494, 495 (repeatedly addressing how the statute "exposes" defendants to an increased statutory maximum sentence).

This Court restated the controlling constitutional principle in statutory terms, consistent with the doctrine of judicial review: "[I]t is *unconstitutional for a legislature* to remove from the jury the assessment of facts that increase the prescribed range of penalties ...." *Id.* at 490 (emphasis added) (internal quotation marks and citations omitted). The Court ultimately articulated a substantive constitutional constraint on *legislative* power to define criminal offenses, and applied that constraint in a case in which the defendant had waived his trial rights, including the right to a jury trial, and pleaded guilty. *Id.* at 469-70. Simply put, *Apprendi* rendered statutes creating sentence-enhancing facts which are not elements unconstitutional *per se*. It did not invite judges to create a new, legislatively unauthorized system of jury-guided sentencing.

2. Here, petitioner nonetheless makes no attempt to construe § 841 to avoid the likely fatal conflict between the Constitution and Congress' (supposed) creation of § 841 threshold drug amounts as sentence-enhancing facts. *Cf. Castillo v. United States*, 530 U.S. 120, 123-24 (2000) (statutory choice between elements and implied sentence-enhancing facts is antecedent to constitutional analysis).

Rather, accepting the controlling circuit precedent in the court below, petitioner relies upon a new doctrine of constitutional adjudication articulated by some courts of appeals and supposedly based on *Apprendi*. This doctrine finds in *Apprendi* authority to *contradict* congressional intent to establish drug quantities as sentence-enhancing facts. This new doctrine would require that drug amount be alleged in the indictment and submitted to the jury, but only if the sentence later imposed exceeds the otherwise applicable statutory maximum. Pet. Br. at 15-16; *see United States v. Promise*, 255 F.3d 150, 156 (4th Cir. 2001) (en banc), *petition for cert. pending*, No. 01-6398 (docketed September 20, 2001)

(accepting preexisting construction that "Congress intended these specific threshold quantities to be sentencing factors rather than elements of aggravated drug trafficking offenses"); *id.* ("*Apprendi* dictates that in order to authorize the imposition of a sentence exceeding the maximum allowable without a jury finding of a specific threshold drug quantity, the specific threshold quantity must be treated as an element of an aggravated drug trafficking offense"); *id.* at 186 (Motz, J.) (concurring in, *inter alia*, Part II-A, dissenting from judgment).[17]

This new mode constitutional adjudication flies in the face of fundamental tenets of constitutional law and judicial review. Only Congress can define the elements of a federal offense. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998); *Staples v. United States*, 511 U.S. 600, 604 (1994). A new constitutional decision by this Court in a state case cannot somehow convert what was not an element of a federal offense into an element.

A court may use avoidance of a constitutional problem as a tool of statutory construction,[18] but not as a justification to contradict legislative intent. If Congress intended drug type and amount to be sentencing factors, the courts must honor that intent in subjecting § 841 to judicial review. *See Miller v. French*, 530 U.S. 327, 339 (2000) (federal court "cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question"); *Hill v. Wallace*, 259 U.S. 44, 71 (1922) (Taft, Ch.J.) (severability analysis "does not give the court power to amend the act"). Judicial review is limited to upholding or striking down the provision enacted by Congress. *See United States v. Jackson*, 390 U.S. 570, 572-82 (1968) (voiding death penalty provision applicable

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[17]This constitutionally novel approach prevails, at least with respect to submission of threshold drug amounts to the jury and with immaterial linguistic variations, in every circuit except the Ninth Circuit. *See, e.g., United States v. Thomas*, 274 F.3d 655, 663 (2d Cir. 2001) (en banc); *United States v. Sanchez*, 269 F.3d 1250, 1265 & n.27 (11th Cir. 2001), *petition for cert. pending* No. 01-8100 (docketed Jan. 15, 2002); *id.* at 1267-70; *United States v. Vazquez*, 271 F.3d 93, 96 (3d Cir. 2001) (en banc) *petition for cert. pending*, No. 01-9014, docketed March 15, 2002); *id.* at 98-99; *United States v. Doggett*, 230 F.3d 160, 163-65 (5th Cir. 2000).

[18]See, *e.g., United States v. Lopez*, 514 U.S. 549, 562 (1995); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); see also *Jones v. United States*, 526 U.S. 227, 239-40 (1999).

only to those exercising right to jury trial; rejecting Government's proposed extra-statutory procedural overlays). The *Promise-Thomas* approach, despite its apparently broad acceptance, flatly violates these fundamental principles. *Cf. Promise*, 255 F.3d at 165 (Wilkinson, Ch.J., concurring in part) ("The creation of new offense elements out of a statute's traditional sentencing factors works a serious infringement on the powers of a co-equal branch of government," and is "to the general detriment of popular governance").

3. The Ninth Circuit in *United States v. Buckland*, 277 F.3d 1173 (9th Cir. 2002) (en banc), reached essentially the same result by a path which is analytically inconsistent with the *Promise* approach. *See id.* at 1179 (declining request to "'sever' Congress's alleged intent from the statute and . . . fill the resulting void with the new procedure mandated by *Apprendi*"); *id.* at 1182 (overruling *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000), its post-*Apprendi* analog to *Promise*). Instead, *Buckland* recognized the possibility that if Congress intended to create threshold drug amounts as sentence-enhancing facts, the statute would be unconstitutional under *Apprendi*. *Id.* at 1179. Expressly to avoid this outcome, the court construed the statute anew. *Id.* at 1179-82.

According to *Buckland*, § 841 does not run afoul of *Apprendi* because Congress did not expressly say judges must determine drug amount by a preponderance of the evidence. Instead, the court reasoned, Congress intentionally left the fact-finder and the burden of proof undefined, for courts to determine later. *Buckland*, 277 F.3d at 1179-80 (following *United States v. Brough*, 243 F.3d 1078 (7th Cir. 2001)). *Buckland* nonetheless declined to decide whether Congress intended threshold drug amounts to be "elements" or "sentencing factors," reading *Apprendi* to substitute an "effect" test in lieu of "semantical hair splitting" between elements and sentencing factors.[19] Finding that Congress intended "to ramp up the punishment for controlled substance offenders based upon the type and amount of illegal substance involved in the crime," *Buckland* held that

[19] *Brough* purported to determine that Congress maintained a distinction between "elements of the *offense*" and "the events . . . on which the prosecutor relies to establish maximum sentence." *Brough*, 243 F.3d at 1080 (emphasis original). This is nothing but evasion of *Apprendi*'s essence.

drug type and amount must be treated for purposes of allegation, proof and verdict like "any other material fact in a criminal case." *Id.* at 1182-83.

Buckland's whole-cloth statutory construction is deeply flawed. *Apprendi* holds unconstitutional any statute that would increase the maximum sentence without assuring the protections associated with elements. *Apprendi*, 530 U.S. at 494. At the same time, the Court's controlling *statutory* precedents pose a choice between construing a concededly maximum-extending fact in a federal criminal law as either an element or a sentencing factor. *Castillo*, 530 U.S. at 121 (2000) ("offense elements . . . or sentencing factors); *Jones v. United States*, 526 U.S. 227, 239 (2000) ("an element of an offense rather than a sentencing consideration").

In light of the choice posed, *Buckland*'s analysis is incomplete. On the one hand, *Buckland* rejects the primary basis upon which other courts rely for holding that drug amount is a sentence-enhancing fact. 577 F.3d at 1180 (holding that "unlawful acts" and "penalties" headings do not appear in the statute); *compare Promise*, 255 F.3d at 170-71 (Luttig, J., concurring) (basing statutory analysis on headings). Yet, *Buckland*, like *Brough*, never suggests another reason why drug type and amount should be considered anything but elements.

Buckland's determination that Congress deliberately intended to leave to the courts the allocation of the burden of proof and the identity of the fact-finder raises separate constitutional concerns:

> It is one thing [for a court] to fill a minor gap in a statute -- to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and thrust it upon unwilling defendants for the sole purpose of rescuing a statute from a charge of unconstitutionality.

Jackson, 390 U.S. at 580. Congress must define the contours of federal criminal offenses, *Bousley*, 523 U.S. at 620-21, and the courts cannot revise an allocation of authority between judge and jury which is explicit or implicit in a criminal statute. *Jackson*, 390 U.S. at 572-82 (rejecting government's attempt to save a statute through extra-statutory procedural overlays). While *Buckland* is correct that *United States v. Evans*, 333 U.S. 483 (1948), undermines any sentence-enhancing interpretation of drug amount, 577 F.3d at 1181,

Evans also defeats a construction based upon a specific congressional intent to leave the contours of § 841 for judicial determination. *See Evans*, 333 U.S. at 486 (Constitution limits the Court in supplying the undefined in criminal statutes).

One of the principal flaws of the statute in *Evans* was its ambiguity as to the allowable unit of prosecution. *Id.* at 490-91 (declining to resolve the "scope and quality of the forbidden acts" chargeable in each count because it "would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts, in order to make a judicial determination of the scope and character of the penalty"). Drug type and amount are too intimately related to the allowable unit of prosecution to have been validly left to the courts for further definition. *Compare United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) ("Congress intended the possession of each scheduled substance to be a different offense"), *with United States v. Edwards*, 105 F.3d 1179, 1181 (7th Cir. 1998) ("a controlled substance" is only element; drug types and amounts go to sentencing under the singular offense), *aff'd*, 523 U.S. 511 (1998).[20]

Because *Buckland's* statutory analysis is defective, and the *Promise-Thomas* aproach constitutes a judicial usurpation of legislative power, the Court should reject the petitioner's position and affirm the judgment of the Fourth Circuit on statutory grounds.

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[20]This Court's construction of § 841 is particularly needed to ameliorate an untenable situation not directly presented by this case. Due to a switch in the courts of appeals after *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), from construing drug type as an element to construing it as a sentence-enhancing fact, there are individuals now serving extended sentences because drug type *is* an offense element, *see United States v. Richardson*, 86 F.3d 1537, 1552-53 (10th Cir. 1996) (collecting cases), *cert. denied*, 519 U.S. 1030 (1996), and others now serving extended sentences because it *is not* an element. *See, e.g., Lewis*, 113 F.3d at 489-92.

III. The Holding in *Neder v. United States*, 527 U.S. 1 (1999), Cannot Be Extended to Allow a Court of Appeals to Decide that the Evidence at Trial or Sentencing Was Sufficient to Render "Harmless" the Defendant's Conviction and Life Sentence for a Level of Offense Not Charged in the Indictment or Presented at Trial.

Petitioner proposes to extend *Neder v. United States*, 527 U.S. 1 (1999), to the context of drug amount omitted from the indictment in a controlled substances case. Pet. Br. at 18-22. In this attempt, petitioner affirmatively, if subtly, relies upon *Neder* to gloss over the barely acknowledged, additional problem in this case that drug amount was not included in the instructions to the petit jury. Pet. Br. at 20-21; *see also id.* at 23-24. There are, however, fundamental differences between the context in which the new appellate interpretation of materiality as an offense element for jury determination in *Neder* applied and the context in which the new appellate interpretation of drug amount as an offense-distinguishing element applies. Petitioner's reliance upon *Neder* is misplaced with respect to both the omitted instruction to the petit jury and the omitted allegation in the indictment.

The change in law *Neder* addressed—from materiality as a "legal element" to an ordinary offense element—occurred in a unique procedural context. *See Neder*, 527 U.S. at 14 ("this case arose in the legal equivalent of a laboratory test tube"). At the time of trial in *Neder*, materiality concededly was an offense element. *Neder*, 527 U.S. at 8; *Johnson v. United States*, 520 U.S. 461, 464 (1997); *United States v. Gaudin*, 515 U.S. 506, 509 (1995). Widespread precedent had held, however, that it was a "legal" element, to be decided by the judge rather than the jury. *Gaudin*, 515 U.S. at 516-21. Nonetheless, the prosecution still offered evidence *at trial* to prove the element. *See Neder*, 527 U.S. at 16 (evidence of $5 million in unreported income); *Johnson*, 520 U.S. at 464 (noting defendant's unsuccessful objection to proof of materiality during the trial); *Gaudin*, 515 U.S. at 508 (prosecutor presented trial testimony on materiality). The district court in *Neder* determined the legal element of materiality under a beyond-a-reasonable-doubt standard. *See Neder*, 527 U.S. at 9 ("Neder was tried . . . under the correct standard of proof"); *cf. Gaudin*, 515 U.S. at 510 n.1 (some

courts did not require beyond-a-reasonable-doubt standard for legal elements). The materiality element constituted a necessary part of the verdict of guilt. *Johnson*, 520 U.S. at 464 (district court included binding instructions on materiality in jury charge); *Gaudin*, 515 U.S. at 508 (same); *Neder*, 527 U.S. at 6 (district court instructed that materiality on tax and bank fraud charges, although alleged, were not jury questions; the court separately found at trial that materiality had been proved).[21] In *Neder*, the *only* difference between the district court's erroneous "legal elements" interpretation and the interpretation adopted on appeal was that under the legal elements theory the jury did not decide materiality the judge did.

Once the correct construction of this statute is recognized, neither the error in the sentence nor the "error" in the indictment and jury charge can be excused under *Neder*. The present case occurred in a vastly different procedural context. At the time of trial, unanimous circuit precedent construed drug amount as a "sentencing factor." Pet. Br. at 15, 48. The defendant could not successfully defend at trial against a finding of a threshold statutory drug amount because it was a matter for the district court at sentencing, not a trial issue at all—let alone one for the jury. *See, e.g.*, *United States v. Moreno*, 899 F.2d 465, 472-74 (6th Cir. 1990) (jury conviction on lesser-included drug amount, and acquittal of a greater-inclusive amount, does not constrain a district court's *statutory* drug amount determinations for sentencing).[22] Thus, statutory threshold drug amount formed no part of the offense of conviction. *See, e.g.*, *United States*

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[21] In *Neder*, the Court limited its discussion of structural error, and its application of harmless-error review, to materiality under the tax fraud charge. *Id.* at 8, 15-20. As the Court remanded the remaining counts to the court of appeals for consideration of whether the instructions were harmless, *id.* at 25, the Court never addressed whether the district court's erroneous holding that materiality constituted no form of element for wire and mail fraud offenses was distinguishable from its erroneous construction of materiality under the tax fraud count for purposes of structural-error and harmless-error analysis.

[22] *See also United States v. Castaneda*, 9 F.3d 761, 769-70 (9th Cir. 1993)(reversible error for the district court to consider itself bound at sentencing by jury *statutory* drug amount finding); *United States v. Chapple*, 985 F.2d 729, 731 (3d Cir. 1993) (same); *United States v. Jacobo*, 934 F.2d 411, 416-18 (2d Cir. 1991) (same).

v. Edwards, 105 F.3d 1179, 1181 (7th Cir.) ("a controlled substance" is the element; drug types and amounts go to sentencing under the singular offense), *aff'd on other grounds*, 523 U.S. 511 (1998). At sentencing, the burden of proof was a mere preponderance of the evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997).

With threshold drug amounts determined to be offense elements, the wrong decision-maker not only made the decision, but made it under a reduced standard of proof, at the wrong time; the then-prevailing adjudicatory framework was completely different from, and inconsistent with, the one Congress intended.

In *Cole v. Arkansas*, 333 U.S. 196 (1948) (*Cole I*), this Court established that an appellate court could not affirm a sentence for one offense based upon an appellate conclusion that the record established the defendants were guilty of a distinct, related offense. Rather, due process requires that a defendant be *both* charged *and* tried and convicted of a particular offense before any court may render or affirm a judgment based upon it.

Cole I implicated three related statutory offenses under an Arkansas strike-violence law. The *Cole* petitioners' co-defendant was convicted of an offense under § 2 of the law defined as acting in concert with another, assembling where a labor dispute existed and using violence to prevent a person from lawfully working. *Id.* at 198; *see also Cole v. Arkansas*, 338 U.S. 345, 346 (1949) (*Cole II*). Petitioners themselves were convicted of a distinct offense under § 2 of the law, defined as acting in concert with another to promote, encourage or aid "any such unlawful assemblage" (referring to the assemblage defined in the other § 2 offense). *Cole I*, 333 U.S. at 197-98. The Arkansas supreme court affirmed on the ground that the information had charged and evidence showed defendants committed a distinct, related offense under a different section: § 1 of the law, defined as using violence or threatening violence to prevent or attempt to prevent a person from lawfully working. *Id.* at 198, 199-20 & n. 2.

The Court determined that the jury charge did not include a finding on the use or threat of violence element of § 1. *Id.*

at 199.[23] But the Court acknowledged that, on appeal, the state supreme court held that the charge in the language of § 2 alleged the actual use of violence (necessary for a conviction under § 1). *Id.* at 200, 201. The Court nonetheless held that the course of proceedings violated due process:

> If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is *doubtful* both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; *it is certain that they were not tried for or found guilty of it*. It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.

Id. at 201 (emphasis added). The Court therefore reversed and remanded to the state courts for further proceedings. *Id.* at 202.

After the Arkansas Supreme Court affirmed the petitioners' convictions on remand, the case returned to the Court. *Cole II*, 338 U.S. at 347. The "more subtle and far-reaching" concern in *Cole II* was that "the trial court and the appellate court adopted contrasting interpretations of . . . section [2]. . . ." *Id.* at 348. In the face of a serious constitutional challenge to the aiding-an-assemblage offense in § 2, the state supreme court had construed § 2 to require the accused to aid the assemblage with the *intent* that violence be used. *Id.* at 348-49. The petitioners objected that the intent requirement had been newly added on appeal, because they had been convicted upon instructions permitting conviction for mere presence at an assemblage where unlawful violence occurred. *Id.* at 349. The Court stated that, were this so, "the result [on remand] was a repetition of the earlier error." *Id.* at 348. The Court, however, concluded from the trial record that the petitioners in fact had been properly tried

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[23]The Court found further support that a § 2 offense, not a § 1 offense, was submitted to the jury because an unlawful assemblage, submitted to the jury, was not a § 1 offense element. *Id.* Submission of this element, of course, would not have precluded submission of all § 1 offense elements. *Cf. Blockburger v. United States*, 284 U.S. 299, 302 (1932) (elements test for "same offense").

and convicted for the alleged § 2 offense, including the intent element, and affirmed.

With drug amount as an offense-defining element, *Cole I* requires the conclusion that extending *Neder* to this case would violate due process.[24] Just as the element of actual violence in *Cole I* defined the related § 1 offense and was not submitted to the jury, the agreement here to threshold drug amounts defined a related but uncharged conspiracy offense under 21 U.S.C. § 846 and was not submitted to the jury.[25]

The rule in *Cole II*, that an appellate court cannot add an element to a crime to save a statute and affirm a judgment based upon the element added on appeal, survives *Neder*, illustrates the special circumstances underlying *Neder*'s rule, and cautions against injudicious extensions of the *Neder* holding. The defendant in *Neder*, despite the reservation of the "legal element" to the judge, was charged and tried (if not properly convicted) under the *same elements* upon which the Court affirmed. *Neder*, 527 U.S. at 9. The "legal element" construction rejected on appeal in *Neder*, like an instruction erroneously describing an element at the conclusion of the trial, involved error limited to the jury instructions alone, without any collateral impact on the issues at stake at trial, the burden of proof, or the incentives of trial participants. *See Neder*, 527 U.S. at 9-10; *id.* at 11-13. Moreover, the trial record created under the burden of proof applicable to elements can support an inference on appeal *from the trial record* that the defendant contested and presented such evidence as he

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[24]This Court has repeatedly applied *Cole I*'s rule that an appellate court violates due process by affirming a judgment based upon an offense theory or set of facts for which the appellant was not charged, tried and convicted. *McCormick v. United States*, 500 U.S. 257 (1991) (untried legal and factual grounds cannot support conviction); *Chiarella v. United States*, 445 U.S. 222, 237 n.21 (1980) (different legal theory); *Dunn v. United States*, 442 U.S. 100 (1979) (unindicted and untried perjuries cannot support conviction); *Presnell v. Georgia*, 439 U.S. 14 (1978) (untried aggravating factor cannot support death sentence); *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (uncharged and untried acts of contempt cannot support conviction); *Garner v. Louisiana*, 368 U.S. 157, 164 (1961) (uncharged and untried criminal trespass offense cannot support sentence).

[25]When an element distinguishes between offenses, a defendant has no incentive to object—indeed, every incentive not to object—that the indictment or the jury instructions fails to expose him to a more serious charge.

could, or would on retrial. *Cf. id.* at 19 ("defendant did not, and apparently could not, bring forth facts contesting the omitted element").

In contrast, adding an element on appeal that was never at issue in the trial alters, after the fact, the very framework of the trial. Here, the unanimous circuit precedent construing drug amount as a sentence-enhancing fact and not an element affirmatively establishes that defendants received *no relevant notice* that they must, or even could, contest drug amount at trial, *even when drug amount was alleged* as it was here in the original, superseded indictment. *Cf.* Pet. Br. at 24. Moreover, any inference on appeal from the record necessarily would be unsupported judicial speculation as to what choices defendants would have made, with notice, under an *increased* prosecutorial burden of proof at trial and under a completely different adjudicatory framework. *Cf.* Pet. Br. at 19 (relying on *Neder* review of trial evidence); *id.* at 24 (contending that *sentencing evidence* can establish probable cause for indictment).[26] As in *Cole I* and *Cole II* (potentially), the change in interpretation in this case involved additional, pervasive errors defeating notice and the opportunity to be heard, as well as a record inadequate for appellate review. Thus, extending *Neder* to this case to affirm a sentence based upon an uncharged and untried aggravated offense would validate structural error and, independently, violate due process.[27]

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[26]Petitioner, without supporting authority, asks the Court to include sentencing evidence in the "entire record" to be reviewed, Pet. Br. at 23, 45 n.14, implicitly conceding the absence of *relevant* notice and consequently the review-defying inadequacies in the trial record.

[27]Because petitioner's attempt to extend *Neder* to uncharged and untried greater-inclusive drug offenses fails despite the utter fiction, necessary to invoke *Neder* in the first place, that the error in this case is the "omission" from the indictment and the jury charge of the greater-inclusive offenses, *see United State v. Vazquez*, 271 F.3d 93, 101-02 (3d Cir. 2001) (en banc), the Court should not perpetuate the fiction. The error in the respondents' cases is simply a classic illegal sentence. If Rule 52 applies to illegal sentences at all, such sentences surely affect substantial rights, *see Glover v. United States*, 521 U.S. 198 (2001), and affirming the sentences would necessarily affect "the fairness, integrity or reputation of judicial proceedings," *United States v. Olano*, 507 U.S. 725, 734 (1993), because it would constitute an independent violation of due process. *Cole I*, 333 U.S. at 201. The plain error rule must look to the "reputation" of the proceedings among persons who are well-versed in constitutional values.

CONCLUSION

Amici acknowledge that the stakes in this case are potentially very high; under any standard of review, the fairness, integrity and public reputation of judicial proceedings are directly at stake. *Amici* submit that those interests will be best secured by enforcing Congress' intent that drug threshold amounts (and drug types) be § 841(b) offense elements, notwithstanding the burden the lower courts may now face due to their previous failure to do so.

For the foregoing reasons, as well as those advanced in the briefs of the respondents, NACDL and FAMM support respondents in seeking affirmance of the judgment below vacating their illegal sentences.

Respectfully submitted,

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